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Supreme Court of the United States

OCTOBER TERM, 1956

NO. ~~746~~ 74

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; IINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKABET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S JASE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE; MITSUI STEAMSHIP CO., LTD.; KAWASAKI KISEN KAISHA; NISSAN KISEN KAISHA, LTD.; TOHO KAIUN KAISHA, LTD.; JINO KAIUN KAISHA, LTD.; MITSUBISHI KAIUN KAISHA, LTD.; KOKUSAI KAIUN KAISHA, LTD.; NIPPON YUSEN KAISHA; OSAKA SHOSEN KAISHA, LTD.; SHINNIHON STEAMSHIP CO., LTD.; YAMASHITA KISEN KAISHA; WILHELMSENS DAMPSKIBSAKTIESELSKAB; A/S DEN NORSKE AFRIKA-OG AUSTRALIELINIE; A/S TONSBERG; A/S TANKFART I; A/S TANKFART IV; A/S TANKFART V; A/S TANKFART VI; SKIBSAKTIESELSKAPET VARILD; SKIBSAKTIESELSKAPET MARINA; AKTIESELSKABET GLITTRE; DAMPSKIBSINTERESSENTSKABET GARONNE; SKIBSAKTIESELSKAPET SANGSTAD; SKIBSAKTIESELSKAPET SOLSTAD; SKIBSAKTIESELSKAPET SILJESTAD; DAMPSKIBSAKTIESELSKABET INTERNATIONAL; SKIBSAKTIESELSKAPET MANDEVILLE; SKIBSAKTIESELSKAPET GOODWILL; DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB; AKTIESELSKABET DAMPSKIBSSELSKABET SYENDBORG; SKIBSAKTIESELSKAPET IGADI; A/S BESCO; AKTIESELSKAPET IVARANS REDERI; A/S LISE; THE DE LA RAMA STEAMSHIP CO., INC.; THE OCEAN STEAM SHIP CO., LTD.; THE CHINA MUTUAL STEAM NAVIGATION COMPANY, LTD.; NEDERLANDSCHE STOOMVAART MAATSCHAPPIJ "OCEAAN" N. V.; THE SWEDISH EAST ASIA CO., LTD.; WATERMAN STEAMSHIP CORPORATION; LYKES BROS. STEAMSHIP CO., INC.; UNITED STATES LINES COMPANY; STATES MARINE CORPORATION; STATES MARINE CORPORATION OF DELAWARE; DAIDO KAIUN KAISHA; AMERICAN PRESIDENT LINES, LTD.,

Petitioners,

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UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ISBRANDTSEN COMPANY, INC., and EZRA TAFT BENSON, Secretary of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein, the Japan-Atlantic and Gulf Freight Conference and its seventeen member lines, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court.

Opinion Below

The majority and concurring opinions of the court below (R. 236-50) have not yet been officially reported. They are printed in Appendix B hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 5 U. S. C. § 1040 and 28 U. S. C. § 1254 (1).

The petition is timely, the judgment below having been entered on November 9, 1956.

Question Presented

The Board,[1] after extensive hearings and exhaustion of intermediate procedures, entered an order, pursuant to § 15 of the Shipping Act, 1916, 46 U. S. C. § 814, approving an agreement among the Con-

[1] The Federal Maritime Board and its predecessor agencies which have from time to time administered the Shipping Act are herein referred to as "the Board."

ference Members, common carriers by water in foreign commerce, to institute a dual-rate system under which they would establish one level of rates for shippers who sign contracts to ship by petitioners exclusively and another level of rates 9½ percent higher for shippers who do not sign such contracts. The Board found that, in the interests of shippers and carriers alike, the system agreed upon was necessary to preserve rate stability and avoid destructive rate wars; and that the system would not be monopolistic in its effect. The Court of Appeals set this order aside on the ground that the dual-rate system, despite these findings, is illegal *per se* under § 14, Third of the Shipping Act.

The question presented is whether such a dual-rate system is illegal *per se* under § 14, Third of the Shipping Act, 1916, 46 U. S. C. § 812, with the result that the Board is without power to approve, under § 15 of that Act, an agreement among such common carriers to use such a system.

Statute Involved

The statutory provisions involved, §§ 14 and 15 of the Shipping Act, 1916, 39 Stat. 733, as amended, 46 U. S. C. §§ 812, 814,[2] are printed in Appendix A hereto together with the other pertinent sections of the Act, particularly § 16 thereof.

[2] Sections 14 and 15, which are above mentioned with their official citations, constitute the principal subject matter of this controversy and are so frequently referred to that we shall designate them merely § 14 or § 15, as the case may be. As to all other statutory citations, U. S. C. references will be given and the official citations may be found in the table of authorities. References to the certified transcript of the Record filed with this Court are given as "(R.)"; and references to the Appendices hereto as "(App. , p.)."

Statement of the Case

There are no issues of fact. By the amended pre-hearing stipulation below, the parties agreed to be bound by the "facts existing in the administrative record as found by the Board itself" (R. 229, 230, 232, 234).

Applying the criteria laid down by this Court in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 304 (1937), the Board found that petitioners' proposed dual-rate system was necessary to restore and maintain rate stability in the Japan-Atlantic and Gulf trade and to prevent destructive rate wars; that the proposed spread between contract and non-contract rates was reasonable; that a non-conference competitor would not be excluded from the trade, but would carry at least its aliquot part of the traffic; and that, with certain modifications required by the Board, the proposed form of exclusive patronage contract with shippers, including the provision for liquidated damages, was reasonable. On the basis of these findings the Board concluded that the proposed dual-rate system should be approved under § 15 of the Shipping Act (R. 61-9).

The Conference Member Lines serve the trade from Japan, Korea and Okinawa to United States Atlantic and Gulf of Mexico ports. Prior to World War II, they had employed a dual-rate system and thereby brought about stability of rates (R. 23, 24-5). The system was not reinstituted immediately following the post-war resumption of commercial trading with Japan in late 1948. Respondent Isbrandtsen Company, Inc., commenced a service in the Japan/U. S. North

Atlantic trade and, since 1949, has operated approximately fortnightly sailings (R. 24, 25, 28). Although entitled to Conference membership and, in fact, invited to join, Isbrandtsen, in accordance with its established policy, has elected to operate outside the Conference and in rate competition with it (R. 25).

Isbrandtsen did not develop an independent rate structure, but rather pursued the policy of undercuoting Conference rates generally by 10 percent. Isbrandtsen's representatives appealed to shippers by publicly proclaiming its cut-rate tariffs. This appeal has been furthered by such methods as the circulation of comparative tariffs showing Conference rates in one column and Isbrandtsen's cut rates for the same commodities in an adjacent column (R. 29).

Isbrandtsen during the next three years, 1950, 1951 and 1952, with only 11% of the sailings, succeeded in securing 30% of the cargo. During the same period on each sailing Isbrandtsen's vessels carried on the average three times as much as the Conference lines' vessels, although the Conference vessels afforded special facilities which Isbrandtsen's vessels were not equipped to furnish (R. 25; 26-7, Table I). Considering the high proportion of fixed operating costs per vessel, this impact upon the Conference Lines threatened the very objectives of their agreement, viz., the maintenance of stability and uniformity of rates for shippers together with a compensatory return for the carriers.

The Conference determined that it could not regain its lost traffic by conforming its rates to those Isbrandtsen was then charging inasmuch as Isbrandtsen, in pursuing its rate-cutting policy, would auto-

matically counter these Conference reductions by further cuts until rates would reach a non-compensatory level. Indeed, the Conference would be at a disadvantage in any rate-cutting competition with Isbrandtsen since, as distinguished from Isbrandtsen, a deliberative process is a condition precedent to any rate action that the Conference might undertake (R. 30).

The Conference could have opened rates, *i. e.*, released them from Conference control, so that the members would be in rate competition not only with Isbrandtsen but with each other. Historically, the result of this course is a rate war and an unstable rate structure, hardly a desirable solution from either the public or the private point of view.

In the circumstances, the Conference was relegated to the adoption of a dual-rate system, a defensive measure which it had employed pre-World War II and which numerous other conferences, under analogous circumstances, had maintained for years, all in reliance on the rulings of the Board made pursuant to its interpretation that the Shipping Act authorized the employment of a dual-rate system in the appropriate situation—an interpretation which appeared to be corroborated by the opinions of this Court in 1932 and subsequent years. The proposal of this Conference was filed in a Statement under the Board's General Order 76,[3] which would permit such proposals to become effective after 30 days unless on the basis of objections or of its own motion the Board should postpone its effectiveness. Isbrandtsen and the Department of Justice protested and requested postponement of the system pending the outcome of a

[3] 46 C. F. R. §236.3.

hearing on their protests. The Board granted the request for a hearing but denied the postponement.

The court below, by interlocutory injunction in an earlier review, stayed so much of the Board's order as denied the postponement and enjoined the Conference from instituting the system.[4]

The Conference, restrained from using its only defensive device which would maintain rate stability and unable further to endure the loss of traffic, in the Spring of 1953 opened rates on the major traffic items. The result was a rate war in which rates, utterly lacking stability, plunged about 60 to 70 percent, and in some instances even below loading and discharging costs (R. 30-1).

The historical effect of a rate war upon United States commerce, as found by the Alexander Committee in 1914, was repeated in this case. The Board found (R. 32):

> "The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F. O. B.

[4] The court announced in chambers on February 3, 1953, that it was of opinion the interlocutory injunction should be granted. The order granting same was made and filed on March 23, 1953. The court's final order in that proceeding set aside so much of the Board's order as had been stayed and enjoined the Conference from instituting the dual-rate system until the Board should specifically approve thereof pursuant to § 15 of the Shipping Act. *Isbrandtsen Company, Inc.* v. *United States*, 211 F. 2d 51, cert. denied *sub nom. Japan-Atlantic & Gulf Freight Conference, et al.* v. *United States, et al.*, 347 U. S. 990 (1954).

> buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States."

The evils of instability continue to this day, albeit rates, under the impact of unexpectedly heavy cargo movements, have recovered from their early depths.

In the meantime the hearings before the Examiner and thereafter the Board were proceeding, culminating on December 12, 1955, in the Board's approval of the proposed system with specified modifications, based upon the findings above abstracted. Isbrandtsen thereupon, by its petition filed in the court below pursuant to 5 U. S. C. §§ 1031, *et seq.*, sought to have the Board's Report, and the Orders predicated thereon, vacated and set aside, and requested injunctions against their enforcement and the institution of the dual-rate system by the Conference (R. 2-18).

Under the Hobbs Act (5 U. S. C. §§ 1031, *et seq.*, § 1034), the United States was a necessary party. Under the lower court's Rule 38(a), the Board was likewise a necessary party. The United States and the Secretary of Agriculture, who had intervened at an earlier stage of the proceedings, appeared by the Attorney General and argued that the Board's Order and approval be set aside. The Board appeared by its general counsel and, together with the petitioners, who intervened, argued in support of its order.

The final judgment, of which review by this Court is now sought, set aside the Board's Order and ap-

proval and enjoined the Conference from acting under it. The decision rested squarely on the basic legal proposition that the dual-rate system is illegal *per se* under § 14, Third of the Shipping Act.

Reasons for Granting the Writ

1. The Question Involved Is of Paramount Public Importance.

(a) The decision below affects countless persons, shippers, carriers and consumers who are not parties to this litigation and who reside throughout the United States and in foreign lands.

The decision below demolishes a long established practice of numerous ocean carriers of many nationalities in widespread branches of our foreign commerce who are not parties to this litigation. It also affects countless merchants, not only throughout our nation but wherever, throughout the world, men trade with the United States and its people. These men cannot freely conduct their business if every sale for future delivery involves a hazardous speculation in freight rates. Representatives of thousands of Japanese exporters so testified in this case. No merchant appeared to express a contrary view.

There are upwards of sixty conferences serving various United States foreign trades which currently employ dual-rate systems not yet under formal attack. We understand, however, that Isbrandtsen has already demanded that the Board should direct these Conferences to cease and desist on the ground that dual-rate systems have been rendered illegal *per se* under the decision below.

To illustrate the decision's widespread geographical impact, we attach as Appendix C hereto a copy of an advertisement which, we are informed, Isbrandtsen placed in the November 15, 1956, issue of South China Morning Post, printed in Hong Kong, in which merchants are advised that the decision below rendered unlawful dual-rate systems in all American trade routes, including the Hong Kong/United States dual-rate system, and that hence the freight contracts between shippers and carriers in that trade were void.

(b) The decision below will affect other pending litigation.

There are pending in the court below two cases entitled *Ezra Taft Benson, Secretary of Agriculture of the United States* v. *United States and Federal Maritime Board et al.*, Nos. 13,316 and 13,373, attacking as illegal *per se* the dual-rate system of the North Atlantic Continental Freight Conference,[5] approved by the Board on February 29, 1956. Now before the Board are F. M. B. Dockets Nos. 726, 733, 734 and 735, attacking as illegal *per se* the dual-rate system of the Far East Conference,[6] which has been in effect since 1929; F. M. B. Docket No. 732, attacking as illegal *per se* the dual-rate system of the Gulf/Mediterranean Ports Conference;[7] and F. M. B. Docket No. 795, involving a proposal of the Great Lakes-Bordeaux/Hamburg Range Westbound Conference to institute a dual-rate system.

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[5] This Conference serves the trade from United States North Atlantic ports to ports in Belgium, Holland and Germany, exclusive of German Baltic ports.

[6] This Conference serves the trade from United States Atlantic and Gulf of Mexico ports to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, and the Philippine Islands.

[7] This Conference covers the trade from United States Gulf of Mexico and South Atlantic ports to ports in the Mediterranean, Adriatic, Gulf of Taranto, and Black Sea areas.

(c) The conflicting positions of the participating governmental agencies confirm the significance of the issue at stake.

The importance of this question is underscored by the active, although we believe ill-founded, opposition of the Departments of Justice and Agriculture. Our farmers obviously have no special interest in the substantially non-existent agricultural imports from Japan; and, therefore, the Secretary's intervention here, as well as his active participation in other dual-rate cases,[8] must betoken a view that the correct determination of the question presented has overall importance to our agricultural population.

Thus, in addition to the private antagonists, Isbrandtsen on one side and the Conference on the other, we find the government itself divided on this question. On one side, the Departments of Justice and Agriculture are animated by the view that antitrust concepts must at all costs be applied to international shipping. On the other, the Board, with 40 years' experience in the regulation of shipping under legislation committing that function exclusively to it, contends that, in international shipping, antitrust concepts without modification to fit particular circumstances mean chaos; and that the Shipping Act objectives of promoting our foreign commerce and improving our merchant marine require rate stability and uniformity, and that these objectives can justify associational activity necessary to achieve them.

In view of this irreconcilable conflict among government representatives, the decision below has confronted the major portion of the maritime industry

[8] *E. g.*, the Transatlantic dual-rate case, footnote 5, *supra*.

and their legal advisers with uncertainty whether their understanding of the Shipping Act and of the decisions of this Court or the understanding stated by the court below is correct. Section 14 of the Shipping Act is penal; violation is a misdemeanor punishable by a fine of not more than $25,000. We urge that the ocean carriers be not left in doubt in so vital a matter and that a decision of this Court resolving this conflict is in the general interest.

2. The Decision Below Ignored and Overturned a Settled Administrative Interpretation and Practice Vital to the Accomplishment of the Objectives of the Shipping Act.

From the earliest time, the Board has taken the position that the dual-rate system is not illegal *per se*, but that its legality depends upon the competitive and economic conditions prevailing in the trade under inquiry. Its earliest decided case on the point was *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1 U. S. S. B. 41 (1922). Although the Board there disapproved the system under attack as practiced by a single carrier, it held (*Id.* at 48):

> "After full consideration of all the facts and evidence of record, the board concludes and decides that the exaction of higher rates from the complainants than from other shippers for like service *under the circumstances involved in this case* subjected the complainants to undue and unreasonable prejudice and disadvantage, and constituted unjust discrimination between shippers, *in violation of sections 16 and 17 of the shipping act.*" (Italics supplied.)

However, the Board rejected, on the adduced evidence, the charge of violation of § 14, Third (*Id.* at 46).

This treatment of the legality of dual-rate systems as depending upon the facts of each case has persisted to this day; albeit the Board, with the guidance of this Court (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 304 (1937)), has evolved the criteria to be applied. The Report of the Board herein so thoroughly and concisely reviews the many intervening administrative decisions, that for brevity we here content ourselves with a reference to the Board's analysis (R. 38-50).[9] In all of the later decisions cited in the report, the Board followed the criteria prescribed in *Swayne & Hoyt, Ltd., supra,* and sustained the validity of dual-rate systems where they operated to secure stability of rates without unduly restricting competition.

The court below, although it stated that it might agree with the validity of rate stability as an objective, nevertheless felt it had to deprive the maritime industry and the regulatory agency of the device of the dual-rate system, thought for these many years to be legal.

The Board's consistent administrative interpretation is entitled to be given great weight. In *United*

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[9] In *Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883, 889-91 (S. D. N. Y. 1951), affirmed by an equally divided Court *sub nom., A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 342 U. S. 950 (1952), the lower court, although deciding the case on its facts, took issue with the assertion of consistency of administrative interpretation. We submit that the Board's own analysis of its historic position is entitled to weight, and, moreover, that an independent review of the administrative decisions confirms the Board's analysis.

States v. *Midwest Oil Company*, 236 U. S. 459, 472-3. (1915), this Court said:

> "2. It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

Instead of giving weight to the established administrative interpretation and practice, the decision below appears to require the termination of all existing dual-rate systems and the consequent disintegration of regulated conference control of rates in all of those foreign trades which have been confronted with cut-rate competition. It frustrates a principal function of the Board under the Shipping Act and thwarts one of the very purposes that the Congress sought to achieve by the enactment of that legislation.

3. The Decision Below Is Inconsistent With Decisions of This Court.

The petitioners urge that the decision below is in direct conflict with the holdings of this Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S.

474 (1932), *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937), and *Far East Conference* v. *United States*, 342 U. S. 570 (1952). Even if the cited cases should not be considered to have held directly that the dual-rate system is not illegal *per se*, the court below, in the language of paragraph 1(b) of Rule 19, which sets forth those reasons which lead to a grant of certiorari by this Court, "has decided an important question of federal law which has not been, but should be, settled by this court".[10] We submit, however, that a direct conflict exists between the decision below and the above cited opinions of this Court.

In *U. S. Navigation Co.*, this Court affirmed the dismissal of a complaint by a non-conference competitor seeking an injunction against a conference dual-rate system with coercive differentials on the ground that the system violated the antitrust laws. It was held that the Shipping Act *pro tanto* superseded the antitrust laws, and that resort must be had in the first instance to the Board for a determination whether the complaint charged violation of the Act. In considering complainant's contention that the dual-rate system is unlawful *per se*, and that an agreement to maintain one cannot be approved, the Court said (284 U. S. at 485, 487):

> "The * * * [Shipping Act] is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of

[10] The court below states, "We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14 Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. * * * [The] fact is that the cases [those cited above] do not decide the point." (R. 244-5; App. B, pp. B-10—B-11).

> others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. *Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances,* generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.
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> "Moreover, having regard to the peculiar nature of ocean traffic, *it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.*" (Italics supplied.)

There appears to be a direct conflict between the decision below and *U. S. Navigation.* Basic principles of equity procedure would require that the complaint in *U. S. Navigation* should not be dismissed merely because it stated no claim for relief under the Sherman Act if, indeed, the conduct charged therein constituted a *per se* violation of § 14, Third, or any other section of the Shipping Act.

Further, if this Court had entertained the view that a dual-rate system is illegal *per se*, only a ques-

tion of law would have been involved which would not call for the application of the primary administrative jurisdiction rule. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922).

The ruling in *U. S. Navigation Company* was reaffirmed in an antitrust suit brought by the United States in *Far East Conference* v. *United States*, 342 U. S. 570 (1952).[11]

In *Swayne & Hoyt, Ltd.*, 300 U. S. 297 (1937), the Board had suspended certain tariff schedules instituting a dual-rate system in *intercoastal* commerce after finding that the Intercoastal Shipping Act, 1933 (46 U. S. C. § 843, *et seq.*), provided means whereby the Board could directly effect rate stabilization without the necessity of a dual-rate system and that, therefore, the system could only have the effect of restricting competition. The three-judge statutory court had refused to set aside the Board's order on the ground that the dual-rate system, in and of itself, was a violation of § 16 of the Shipping Act (18 F. Supp. at 27-8). On appeal this Court affirmed the court below, but declined to follow its view that a discriminatory tariff was, in and of itself, a violation of § 16 of the Shipping Act. Instead, it held that the issue whether such discrimination was undue or unreasonable within the meaning of § 16 was for the Board to decide and that in the case presented there was substantial evidence to justify the Board's conclusion that the attempted rate discrimination was unreasonable, since its purpose was not to effect rate stabilization. In the course of its opinion, this Court laid down the criteria which should govern the Board

[11] The dissent in *Far East Conference* rested in part on illegality *per se* under § 14, Third.

in determining whether the *prima facie* discrimination involved in a dual-rate system is undue or unreasonable (300 U. S. at 304):

> "*In determining whether the present discrimination was undue or unreasonable* * * * [the Board] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (Italics supplied.)

This Court further had occasion to deal with the relationship of § 16 to § 14, Third and, in an oft-cited footnote (300 U. S. at 307), concluded that the dual-rate system did not *per se* violate that section, saying:

> "* * *
>
> "The report of the House Committee on Merchant Marine & Fisheries [the Alexander Committee], H. R. Doc. 805, 63rd Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e. g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual depend-

> ence on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a previous contract period. Accordingly the Committee did not condemn the contract system completely. Cf. W. T. Rawleigh Co. v. Stoomvaart, 1 U. S. S. B. 285. The policy of the statute may properly be applied where, as in the circumstances of this case, the contract system must be taken as actually operating to effect a monopoly. Cf. Eden Mining Co. v. Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41."

We urge that this footnote is holding, not dictum, since the Court could not have concluded that the Board had a discretion under § 16 with regard to dual-rate systems if the dual-rate system were illegal *per se* under § 14, Third.

The holding below leaves no scope whatever to the doctrine that a *prima facie* discrimination may be found to be justifiable, and renders the carefully articulated yardstick of *Swayne & Hoyt, Ltd.*, completely useless.

4. The Language of the Statute and the Legislative History Are Persuasive That the Dual-Rate System Is Not Illegal *Per Se*.

Whether the question here is considered to involve a conflict with decisions of this Court or to be a matter of first impression, the decision of the court below conflicts with the general purposes of the Act as well as with specific portions thereof.

In international transportation, authority to control rates lies in the respective governments where the termini are located. Exercise of this authority by any of these sovereigns contains the germ of intergovernmental conflict. Accordingly, to secure the benefits to our foreign commerce and our merchant marine flowing from stability of rates, Congress adopted the instrumentality of voluntary cooperation among the carriers under the watchful eyes of the Board. At the same time, it prohibited certain actions, specifically defined, in § 14 of the Act.

Section 14, subdivision First, outlaws deferred rebates, *i. e.*, rebates in consideration of a period of exclusive patronage, payable some time after the end of that period only if, during the period of deferment also, exclusive patronage has been continued. Significantly, subdivision First so narrowly defines the prohibited practice as not to preclude rebates in consideration for exclusive patronage or a promise thereof, available under published tariffs to all shippers alike, and payable promptly on the completion of the service. Subdivision Second outlaws the fighting ship, *i. e.*, a vessel used to exclude competition by driving another carrier out of the trade.

Subdivision Third, the basis of the decision below, provides that no common carrier by water shall, directly or indirectly,

> "Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or

has filed a complaint charging unfair treatment, or for any other reason."

It cannot be contended that a dual-rate system involves refusal or threat to refuse space accommodations. Hence the first clause of subdivision Third is inapplicable. We submit that the court below incorrectly read the remainder of subdivision Third to prohibit the dual-rate system as retaliatory and as a discriminating method.

Retaliation according to the court below consists in the act of differentiating in rates between those shippers who do and those who do not agree to give Conference vessels their cargoes and, secondly, in providing a method of liquidated damages to compensate the carriers upon breach of the shipper's agreement.

This is an extraordinary definition of the concept of "retaliation." It accords neither with the dictionary definition of the term nor with its accepted usage. Surely, to provide for liquidated damages for breach of a contract is not retaliation, but a formula for compensation for breach of contract where legal standards of proof are difficult to meet. Such a formula is unenforcible if the liquidated damages are in the nature of a penalty and not a *bona fide* attempt to measure the consequences of the breach; and being unenforcible could not be retaliatory.

Nor is the offering of a reduced rate to shippers who are willing to cooperate with carriers in achieving a stable rate structure by entering into exclusive agreements with these carriers retaliatory in any sense of that word. Retaliation, as subdivision Third clearly points out, consists of such acts as the refusal

to grant a non-contracting shipper space accommodations or other services that otherwise would have been accorded to him. The Conference does not say to shippers: "Because you have been unwilling to ship exclusively with us, we will not afford you services that otherwise would be available to you." The Conference does say: "If you will agree to give us all your cargoes, we will give you a discount in our rates." This is not retaliation; it is the granting of a preference for a consideration which may or may not be warranted.

Further, we contend that the forbidden "other discriminating or unfair methods" cannot be read so broadly as to comprehend contracts and rates. To do so is to attribute to "other" too vague and ambulatory a meaning for a highly penal provision such as § 14. Here is a most fitting situation for the application of the *ejusdem generis* rule. The forbidden discriminating or unfair methods should be limited to practices involving something akin to refusal of space accommodations, viz., some withholding of physical facilities or services of the common carrier. No such withholding inheres in the dual-rate system.

Indeed, to read the second clause of subdivision Third as absolutely prohibiting *rate* discrimination "*for any other reason*" would render surplusage the prohibitions against *undue, unjust,* or *unreasonable* discrimination contained in §§ 15, 16 and 17 (46 U. S. C. §§ 814, 815, 816), which deal specifically with agreements, preferences and rates, and would cut away the administrative discretion recognized in *Swayne & Hoyt, Ltd.* Surely the determination by the Board, based on substantial evidence, that a particular prac-

tice is not a discriminating or unfair method should be respected by the courts.

That this is the interpretation that should be placed on § 14, Third, is clearly demonstrable by reference to legislative history. The adoption of the Shipping Act was preceded by an exhaustive investigation by the so-called Alexander Committee. The report of that Committee[12] has been recognized for years as basic source material for the interpretation of that Act.

That report specifically analyzes the various methods which it found conferences were employing to meet the competition of outside lines. Among these methods were the dual-rate system, the deferred rebate, the fighting ship and the refusal to grant to shippers who used outside lines services extended to those who dealt exclusively with the conference.[13] The report recommended the prohibition of the three last types of conduct and § 14 carries out this recommendation.[14] But it did not recommend the prohibition of the dual-rate system. It left that question to be dealt with by the Board. In short, if the preferential features of such a system were not justified in the opinion

[12] H. R. Doc. 805, 63d Cong., 2d Sess. (1914).

[13] H. R. Doc. 805, 63d Cong., 2d Sess. 287-90 (1914).

[14] The language of § 14 should be compared with the Committee's recommendation of practices that should be banned (*Id.*, p. 421):

> "(6) That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States. Moreover, all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason."

of the Board by the objectives sought to be attained and by the fairness and reasonableness of the particular methods employed to achieve these objectives, the Board was under the duty to turn down an agreement to put such a dual-rate system into operation.

The concurring opinion below seeks to deprive this argument of its premise by reference to certain contracts in the record of the Alexander Committee Investigation (R. 249, footnote 3; App. B, p. B-15). We submit that the attempted distinction is not justified by the language of the contracts referred to and of the testimony regarding their application. There are numerous other contracts in the Committee's records[15] which must be taken into account if an effort is to be made to impeach the Committee's own description of the dual-rate system as follows[16]:

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and *the shipper agrees to confine all shipments to conference steamers,* and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff,* but the lines generally pursue a policy of giving the small shipper the

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[15] *Proceedings of the House Committee on the Merchant Marine and Fisheries,* 62d Cong., 2d Sess., Vol. I, pp. 225-7, 246-51, 262-3, 265, 274, 385, 386-8, 390-1; Vol. II, pp. 1404-6.

[16] H. R. Doc. 805, 63d Cong., 2d Sess. 290 (1914).

same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms.'" (Italics supplied.)

Further to discredit the contention that the Shipping Act contains no prohibition of the dual-rate system, a practice well known to the Alexander Committee, the concurring opinion would distinguish the exclusive patronage contracts here in issue as being "almost illusory" (R. 249; App. B, p. B-15). While we do not concede the correctness of this characterization of the contracts involved, what is significant is the resort by the concurring Judge to this unrealistic analysis and the concurrence in that analysis by all the Circuit Judges. It obviously has no relationship to the economic impact of the contracts involved in the dual-rate system. To be contrasted is the analysis made by the Board, which took into account the broad economic consequences to carriers and merchants alike, in our foreign commerce, of the employment of these contracts in conjunction with dual-rates, and the Board's comparison of these consequences with the conditions prevailing in the absence of such a system. It was just such economic considerations that motivated the Congress in adopting the Shipping Act. While the Court of Appeals did not quarrel with the Board's interpretation and application of the policy of the Act, it did, on judicial review, nullify the exclusive primary jurisdiction of the Board on a rationale utterly foreign to the standards of judgment proposed by this Court in *U. S. Navigation Co.* (284 U.S. at 485, 487, quoted *supra*).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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January 30, 1957.

APPENDIX A

Selected Provisions of the Shipping Act, 1916, as Amended.

SEC. 14. (46 U. S. C. § 812) That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when

such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

SEC. 15 (46 U. S. C. § 814) That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings

between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act, approved July second, eighteen

hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

SEC. 16. (46 U. S. C. § 815) That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect what-

soever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17 (46 U. S. C. § 816). That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or

collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13027

ISBRANDTSEN COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

THE SECRETARY OF AGRICULTURE,

Intervenor,

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, et al.,

Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL MARITIME BOARD

Decided November 9, 1956

* * * *

Before PRETTYMAN, FAHY and WASHINGTON, *Circuit Judges.*

FAHY, *Circuit Judge:* Pursuant to 64 Stat. 1130 (1950), 5 U. S. C. § 1034 (1952), Isbrandtsen Company, Inc., petitions as a party aggrieved for review of orders of the Federal Maritime Board which are

described as a Report served December 14, 1955, and orders served December 21, 1955, and January 11, 1956. The respondents are the Board and the United States, the latter being a statutory respondent under section 1034, *supra*. The United States, however, represented by the Attorney General, has joined Isbrandtsen in attacking the validity of the orders under review. The intervenors are the Secretary of Agriculture, supporting Isbrandtsen, and the Japan-Atlantic and Gulf Freight Conference, defending the orders of the Board.

The Conference is a voluntary association of 17 steamship lines operating between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America. Five of the members are American, eight are Japanese, and four are of other nations. The primary purpose of the Conference is to establish and maintain agreed rates among the members. The basic agreement under which the Conference operates was approved by a predecessor agency of the Federal Maritime Board in 1934 under section 15 of the Shipping Act of 1916, 39 Stat. 733, as amended, 46 U. S. C. § 814 (1952).[1]

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[1] Section 15 provides in pertinent part:

"Every common carrier by water * * * shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the volume of freight or passenger traffic to be carried; or in any manner providing for an exclusive, prefer-

Isbrandtsen is not a member of the Conference, although membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Since shortly after World War II Isbrandtsen has been the sole non-Conference line which has maintained a berth service in the Japan-Atlantic trade. This trade is overtonnaged and consequently the vessels of both Isbrandtsen and the Conference have had a substantial amount of free and usable space after completion of loading in Japan. Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities an average of 10 per cent below the rates established by Conference members under their agreement. Isbrandtsen's share of the business during this period was substantial,

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ential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

"• • •

"All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto."

and its average carryings per sailing were much higher than were the average carryings of the Conference lines. In order to meet this competition the Conference members voted to adopt the exclusive patronage contract non-contract/dual-rate system described below, but when the Conference was restrained by this court from putting this system into effect prior to its approval by the Board the Conference, on March 12, 1953, opened the rates on ten major commodities. This permitted the member lines to set their own rates and to compete effectively with Isbrandtsen.

After March 12, 1953, rates dropped sharply, even to noncompensatory levels with respect to some commodities. In May, 1953, Isbrandtsen established minimum rates below which it would not go. This adversely affected its competitive position, so that since that date Isbrandtsen has carried little cargo in the trade.

On December 24, 1952, before rates had been opened by the Conference, it had filed with the Board, pursuant to the latter's General Order 76,[2] a statement advising the Board of the Conference's intention to institute in 30 days an exclusive patronage contract/non-contract dual-rate system in the Japan-Atlantic

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[2] Section 236.3 of that Order, 17 F. R. 10175, 46 C. F. R. 236.3, provides that steamship freight conferences proposing to establish contract/non-contract rates should file with the Board a statement containing:

"(a) The amount of the spread or differential . . .

"(b) The effective date;

"(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

"(d) Copies of the form of all contracts pertaining thereto."

trade, hereinafter referred to as the dual-rate system. Under the proposed system shippers who declined to sign an exclusive patronage contract with the Conference would be charged rates 9½ per cent higher for the same transportation service than the rates charged shippers who enter into such contracts. Breach of the exclusive patronage contracts would be sanctioned by means of a liquidated damage clause under which a shipper who breaches the contract by shipping with a non-Conference line would be obligated to pay to the Conference 50 per cent of the contract rate on the shipment. The contract would be entered into for an indefinite period, subject to cancellation by either party on three months notice.

Protests against the proposed dual-rate system were filed by Isbrandtsen and the Department of Justice, who requested the Board to prohibit the Conference from implementing the system until after a hearing had been held. The Board granted the request for a hearing, but declined to suspend operation of the dual-rate system, stating that the system appeared to be in compliance with the Shipping Act.

On petition for review in this court, we held that section 15 of the Act, note 1, *supra,* required the Board to approve the dual-rate system before it could legally be initiated. *Isbrandtsen Co.* v. *United States,* 93 U. S. App. D. C. 293, 211 F. 2d 51, *cert. denied,* 347 U. S. 990. Consequently we set aside the action of the Board allowing the system to go into effect without such approval, and enjoined the Conference from acting under the system until it was approved by the Board. Thereafter the Board's hearings resulted in its approval of the dual-rate system in the orders which are now here for review.

If the arrangements in question are such as the statute authorizes the carriers to make or the Board to approve, they are exempt from the inhibitions of the antitrust laws under section 15, note 1 *supra*. In providing for such exemption, however, the statute also places definite limits. For example sections 16 and 17 of the Act provide, "it shall be unlawful" for any common carrier by water, alone or in conjunction with another, to

> "make or give any undue preference or advantage to any particular person,"

or to

> "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *."

The Board strongly urges that the dual-rate system cannot be said to give any "undue preference or advantage" or to constitute a demand, charge, rate or fare which is "unjustly" discriminatory. It says that because of competitive conditions in the trade the preference is not "undue" or the discrimination "unjust". In explaining these conditions the Board points to the differences in the operating costs of carriers of different nationalities, to the need for stability of rates and services, to freedom of any steamship company to enter this trade in contrast to the requirements of the Interstate Commerce Act that there be a finding of public convenience and necessity, to the relationship between costs of operating and the quantity of cargo carried, and to other factors, all of which, in the view of the Board, are shown by the

record and support the Board's findings that the inauguration of the dual-rate system is a necessary competitive measure to offset the harmful effect of non-Conference competition in an overtonnaged trade subject to the injurious practice of undercutting of Conference rates. The Board points furthermore to its finding that the dual-rate system will decrease the possibility of continued rate wars with their disastrous consequences to American-flag lines, consequences repugnant to the purposes of the Act to encourage the development and creation of a naval auxiliary and reserve, and a merchant marine able to meet the requirements of the commerce of the United States with foreign countries.

We might agree with the Board that the objectives it seeks in approving the dual-rate system are consistent with the objectives of the statute; but these can be furthered only by means permitted by the statute. It is here that we find an insuperable barrier. Section 14, Third, of the Act provides that no common carrier by water shall

> "Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason."

As we have seen, shippers who decline to sign an exclusive patronage contract with the Conference would be charged for the same transportation service rates 9½ per cent higher than those charged shippers who enter into such contracts, and breach of contract

by one who does sign would entail liquidated damages of 50 per cent of the contract rate. While in terms the 9½ per cent higher rate is for failure to enter into an exclusive patronage contract rather than for actually shipping via a non-Conference carrier, in reality the higher rate is for the latter, as are the liquidated damages. Each of these aspects of the dual-rate system is hinged to a shipper giving patronage to another carrier. This is explicit in the provision for liquidated damages, which is part and parcel of the dual-rate system and gives color to the whole; and it is implicit in the difference between the contract rate and the higher non-contract rate. When the latter is charged a shipper who has not entered into an exclusive patronage contract the substance of the matter is that a higher rate is charged because he ships by other than Conference carriers. The industry is concerned with the business of shipping, to which the making of contracts is but an incident. Both provisions, therefore, come within a fair meaning of retaliation. Furthermore, even though the shipper has not patronized another the higher rate constitutes retaliation because it is charged for failure to contract with the Conference. Section 14, Third, applies not only to retaliation for shipping by another carrier but for "any other reason," which would include failure to enter into the exclusive contract arrangement. True it is, as the Board urges with much persuasion, the dual-rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations; but when at the same time the system constitutes retaliation and is also discriminatory it runs into the barrier

of section 14, Third, however desirable it otherwise might be. That provision prohibits not only retaliation by a refusal or threat of refusal, of available space accommodations but also by "resort to other discriminating" methods. In the circumstances stated, the charge of a higher rate for the same service and facilities, of the imposition of the liquidated damages, is *prima facie* discriminatory, *Swayne and Hoyt, Ltd.* v. *United States,* 300 U. S. 297, and for the reasons we have outlined we think that it is also a method of retaliation. This is the thrust of these provisions under a fair reading of the language adopted by Congress. And since these provisions are unlawful the system containing them cannot validly be approved by the Board.

We cannot accept the argument that section 14, Third, must be read, in view of the terms of the Act as a whole, to condemn only retaliation which the Board might on a particular record find "unfair" or "unjustly discriminatory," terms used in other parts of section 14 and in sections 15 and 17. Where the conduct is retaliatory and constitutes discrimination, it is unlawful without more, unless its impact is unsubstantial, a subject we need not consider. Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board. *Swayne and Hoyt, Ltd.* v. *United States, supra.* There the court in effect approved an order of the Secretary of Commerce, the predecessor of the Board, which

had condemned a higher rate for a shipper who used a carrier other than a member of the Conference. The court said the differential was *prima facie* discriminatory since the two rates were charged for identical services and facilities, leaving for decision, in the first instance by the Secretary, the question whether the discrimination was "undue" or "unreasonable." The Secretary having concluded that it was, the court, considering the case under section 16, would not disturb his conclusion, which was in part based upon his finding that the operation of the contract system in the circumstances "does not differ substantially from that of 'deferred rebates' outlawed in both foreign and coastwise shipping by § 14 of the Shipping Act * * *." Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates. For while it is not one of the methods specifically condemned by section 14, as are deferred rebates and fighting ships, nevertheless retaliation is specified in subparagraph Third of section 14 as a method which may not be resorted to when discriminatory.

We are aware that the dual-rate system has not been held by any judicial decision to be invalid under section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system. We have already referred to *Swayne and Hoyt, Ltd.* v. *United States, supra,* which, though it upheld the Board in condemning the dual-rate system there involved, did not rest upon section 14, Third. In *Far East Conference* v. *United States,* 343 U. S. 570, the court, adhering to principles previously laid down

in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U. S. 474, required the District Court to dismiss a suit of the United States which attacked the dual-rate system as violative of the Sherman Act without the particular system having been passed upon initially by the Board. And in *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.*, 342 U. S. 950, the court by an equally divided vote affirmed *Isbrandtsen* v. *United States*, 96 F. Supp. 883, which had invalidated the dual-rate system there involved, not under section 14, Third, but because the spread between the two rates was found to be arbitrary. From this situation in the courts the Board contends that the dual-rate system has not been considered invalid *per se*, otherwise the courts would have disposed of these cases on that ground. This position is an arguable one; but the fact is that the cases do not decide the point. And for the reasons which we have indicated we are of the opinion that additional legislation would be needed to permit the system, in the form here approved by the Board, to obtain the approval of the courts. Congress, after long consideration, lodged very substantial powers in the Board; but we find no language in the statute which, given its fair meaning, permits the Board to grant exemption from the antitrust laws, or to make lawful a discriminatory rate, or the imposition of liquidated damages, for patronizing a competitor, for refusal to enter into an exclusive patronage contract with Conference members, or for not shipping exclusively in accordance with such a contract.

We have considered the legislative history, particularly pertinent parts of H. R. Doc. No. 805, 63d Cong.,

2d Sess. (1914), known as the Alexander Report. The evils afflicting the industry due to uncontrolled competition on the one hand and unregulated carrier combinations on the other, are analyzed in this basic study preceding the Act. Reference is also made to H. R. Rep. No. 659, 64th Cong., 1st Sess. (1915);[3] H. R. 14337, 64th Cong., 1st Sess. (1915); S. Rep. No. 689, 64th Cong., 1st Sess. (1915).[4] We have found in this history no indication of an explicit intention by Congress to outlaw the dual-rate system, as is found with respect to deferred rebates and fighting ships. Furthermore, it is clear from its history, as from the Act itself, that not all discriminatory practices and preferences are unlawful. On the contrary, the Board is authorized to approve many methods, including the formation of the conferences themselves, which would be unlawful except for the Act and Board action thereunder. But it is significant that when Congress came to the matter of retaliation against a shipper it did not permit this particular type of conduct to be engaged in or to be approved by the Board if it involved any discriminating method.[5]

Finally, we have considered the Board's position

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[3] This Report at pp. 30-31 refers to retaliation by refusing space accommodations or "other unfair methods of discrimination."

[4] In this Report, at p. 5, section 15 of H. R. 15455 is described in part as forbidding "retaliation, etc., against a shipper because such shipper has patronized any other carrier."

[5] Compare H. R. 17328, 63d Cong., 2d Sess., section 2, Third, with H. R. 15455, 64th Cong., 1st Sess., showing changes which add "unjust" to "discrimination" in certain parts in the Bill, but not in section 2, Third, which corresponded with section 14, Third, of the Act, where discrimination without qualification is prohibited when used as retaliation.

that the enumeration of deferred rebates and fighting ships as practices absolutely prohibited, in contrast with the failure to include in such enumeration the dual-rate system, indicates that the latter was not to be considered illegal *per se*. We do not accept this position because to do so would seem to us to give little meaning to the important provision of section 14, Third, that retaliation for any reason is also absolutely prohibited if it constitutes discrimination. We think it clear not only that the liquidated damage provision is discriminatory but that a 9½ per cent differential for exactly the same service and facilities is of like character. Further discussion of the matter appears in Judge Washington's concurring opinion "in which, as in the present opinion, we all concur." *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 131, 149 F. 2d 511, 513 (1945).

The orders of the Board will be set aside insofar as they approve the exclusive patronage contract/non-contract rate system.

WASHINGTON, *Circuit Judge*, concurring: I fully concur in Judge Fahy's opinion. However, certain additional observations may be made, with which both my colleagues agree, and which they have asked me to express on behalf of the court.

The crucial question on this appeal is of course whether Section 14, Third, of the Shipping Act of 1916[1] proscribes the type of contract here involved.

In the first place, it seems clear that in actual prac-

[1] 39 STAT. 733, as amended, 46 U. S. C. § 812, Third (1952).

tice the contract system is being used to penalize a shipper because he has patronized another carrier, or at least reserved the right to do so. Is this "retaliation," proscribed by the Act? Certainly there seems no reason to limit "retaliation" to the dictionary definitions of "returning like for like" or "evil for evil," which have been selected by the Board. The very example used by the statute, boycotting for use of another carrier, is not "like for like," nor are the boycotting carrier or group of carriers necessarily imbued with ideas of doing evil. But detriment to the independent shipper and the independent carrier plainly results.

Are these contracts, then, the sort of "discriminating or unfair methods" that the statute sought to anticipate? That the contract system comes within the literal meaning of this phrase is clear. As the Supreme Court observed in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 (1937), a contract system under which different prices are charged for the same transportation of identical cargoes to identical ports under identical circumstances is "prima facie discriminatory."[2] Nevertheless, the Board

[2] It is urged that footnote 3 of the Court's opinion in *Swayne & Hoyt* is some authority for exempting the contracts in this case from Section 14, Third. There are two answers to this argument. First, the Court was there concerned not with a recommendation of the Alexander Committee but with an argument that had been addressed to the Committee. See H. R. Doc. No. 805, 63rd Cong., 2d Sess. 307 (1914). Second, and more significant, is the fact that the contracts considered in *Swayne & Hoyt* closely follow the outlines of the contracts reviewed by the Alexander Committee in 1913, which are materially different from the contracts in this case, see text *infra*. The contracts in *Swayne & Hoyt* contained a firm price agreement that could not be varied during the term of the contract. See Swayne & Hoyt v. United States, 18 F. Supp. 25, 26 (D. D. C. 1936).

urges that the literal meaning of the statute should not be followed.

The Board's basic contention is this: Since dual rate contracts were considered by Congress in its survey of shipping practices, the conspicuous absence of this device from the list of those specifically barred —deferred rebates, fighting ships, and boycotts— demonstrates an implied congressional endorsement of this device. Were the premise sound, the argument would have some merit. But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually 6 months), the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates.[3] In the contracts in suit the carriers' commitment as to space is almost illusory,[4] being a commitment to carry "so far as regular services are available." The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract—guarantee of supply

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[3] For the text of the contracts considered by the Alexander Committee, see *Proceedings of the House Committee on the Merchant Marine and Fisheries*, 62nd Cong., 2d Sess., Vol. 1, pp. 97, 120, 289 (1913). For the Committee's summary of these contracts, see H. R. Doc. 805, *supra* at 290-91. In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs. In other contracts the price stated was binding on both sides. See MARX, INTERNATIONAL SHIPPING CARTELS 202 (1953).

[4] See 1 CORBIN, CONTRACTS § 16 (1950).

and guarantee of no rate increase—are here lacking.[5] In their stead are two essentially penal provisions—the higher rate and the liquidated damage clause—both imposed to coerce shippers to refrain from using non-Conference carriers.[6] These differences are dispositive of the Board's principal argument. Implied congressional approval of a bona fide requirements contract is no basis for exempting the contracts in this case from the plain meaning of "discriminating or unfair methods." They must therefore be condemned.

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[5] See, generally, Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 24 N. Y. U. L. Q. 412, 413 (1948).

[6] This is not to suggest that the liquidated damage clause would necessarily be unenforceable as a penalty, *cf.* Pacific Westbound Conference v. Leval & Co. (unreported) (Cir. Ct. Ore. 1951), cited in *Marx, supra* at 209, though it might be. See 5 CORBIN, CONTRACTS § 1054 (1951). It may be noted that compliance with the contracts used in 1913 was in many instances secured not by deferred rebates, see *Proceedings, supra* at 99, 204, 278, or by penalty clauses, *id.* at 96, but by threat of future boycotting, *ibid.*, a device specifically condemned in Section 14, Third. The contracts in this case would substitute for this blunt weapon the more refined techniques of penalty rates and liquidated damage clauses. Thus, instead of a retaliatory device to enforce a bona fide requirements contract, there are now retaliatory contracts, enforced by methods of seemingly equal effectiveness.

APPENDIX C

ISBRANDTSEN

Round the World Service

We have received the following cable from Isbrandtsen Co., Inc.:—

> UNITED STATES CIRCUIT COURT OF APPEALS WASHINGTON REVERSED FEDERAL MARITIME BOARD ORDER PERMITTING THE JAPAN UNITED STATES ATLANTIC GULF CONFERENCE ESTABLISHMENT OF THE EXCLUSIVE PATRONAGE CONFERENCE CONTRACT SYSTEM AND RULED THE CONFERENCE CONTRACT RATE SYSTEM UNLAWFUL AND CANNOT BE APPROVED BY FEDERAL MARITIME BOARD STOP NATURALLY THIS COURT DECISION MUST APPLY ALL AMERICAN TRADE ROUTES INCLUDING HONGKONG UNITED STATES BOUND CARGO

Any shipper desiring further information about this action of the United States Circuit Court of Appeals should contact us for details. It appears from this action of the United States Circuit Court of Appeals that any Exclusive Patronage Contract which shippers in Hongkong may have signed with the Conference covering the trade routes terminating in the United States will be included within this decision and also be unlawful in so far as cargo bound for the United States is concerned.

General Agents
HOTHERSHIP
Hother Trading & Steamship Co., Ltd.

(Reproduced from South China Morning Post, November 15, 1956).